LIBRARY
SUPREME COURT, U. S.

No. 1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

CITY OF PHOENIX, ARIZONA, et al.,
Appellant,

versus

EMILY KOLODZIEJSKI,
Appellee.

On Appeal from the United States District Court
for the District of Arizona

BRIEF FOR THE STATE OF LOUISIANA
AS AMICUS CURIAE

INDEX

	Page
Interest of Amicus Curiae	1
Statement	3
Summary of Argument	3
Argument	3
Conclusion	13
Certificate	14

TABLE OF CASES

Andrieux v. Parish School Board of East Baton Rouge, 227 So.2d 370 (Louisiana 1969) 11

Chambers v. Road District No. 505 of Tangipahoa Parish, Louisiana, Number 1131, October Term, 1969 12

Cipriano v. City of Houma, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 4

Hadley, et al. v. The Junior College District of Metropolitan Kansas City, Missouri, et al., No. 37, October Term, 1969 (Unreported) 9

Hobbs v. Police Jury of Morehouse Parish, United States District Court for the Western District of Louisiana, Shreveport Division, Civil Action No. 14836, decided on January 23, 1970 (Unreported) 11, 12

Kramer v. Union Free School District, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 6

CASES (Continued)

Page

Stewart, et al. v. The Parish School Board of St. Charles, et al., United States District Court for the Eastern District of Louisiana, Civil Action No. 69-2818 (Unreported) 9

STATE CONSTITUTIONS:

Louisiana Constitution

Article XIV, Section 14(n) 11

ARIZONA CONSTITUTION:

Article 7, Section 13 5

STATE STATUTES:

Arizona Revised Statutes

Section 9-782 5

Section 16-1202 11

Section 16-1204 11

Louisiana Revised Statutes

Section 39:518 11

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969

No. 1066

CITY OF PHOENIX, ARIZONA, et al.,
Appellants,

versus

EMILY KOLODZIEJSKI,
Appellee.

On Appeal from the United States District Court for the District of Arizona

---

BRIEF FOR THE STATE OF LOUISIANA, AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

MAY IT PLEASE THE COURT:

This brief is filed on behalf of the State of Louisiana, and is sponsored by its Attorney General, the chief legal officer of the State, under Rule 42(4) of the Rules of the Supreme Court of the United States.

The State of Louisiana, whose political subdivisions finance the bulk of their public improvements through the issuance of general obligation bonds, has a real and substantial interest in the outcome of this case. This is

true because the Louisiana Constitution and Statutes require such bond issues to be approved by a majority of the property owning taxpayers, both in number of votes cast and amount of assessed valuation voted.

Having a so-called "limited franchise" voting law with some similarity but not identical to the Arizona law, the impact of the Court's decision in this case will undoubtedly be felt in Louisiana. There are, however, significant differences between the Louisiana law and the Arizona law. A decision which did not recognize such differences could destroy the integrity of a vast volume of public bonds in Louisiana, and irrevocably damage the confidence of investors in such type of bonds at incalculable cost to Louisiana taxpayers and the investing public. Therefore, the State of Louisiana feels compelled to call these differences to the attention of the Court.

Louisiana seeks to have the Court sustain the validity of Arizona's property bond election laws despite the differences that exist between the laws of that State and the property bond election laws of Louisiana. Pretermitting these differences, under Arizona law there is a substantial distinction between the obligation of the owner of real estate for the payment of the specific bonds involved and the other taxpayers. This distinction justifies a classification which limits to the owners of real estate the right to vote on bonds secured primarily by taxes on such real estate.

Whatever conclusion may be reached as to the merits of this case, the State of Louisiana is vitally in-

terested in having the Court reaffirm the doctrine of prospectivity with respect to decisions affecting debt obligations of public bodies and recognizing and upholding the peremptive period established by the Constitution and Statutes of Louisiana in accordance with this Court's recent decisions.

STATEMENT

The State of Louisiana, as amicus curiae, adopts the statement of the case appearing in the Statement by Appellant, City of Phoenix, Arizona, upon the jurisdictional question, as amplified by the stipulation of fact contained in the transcript of proceedings in the three-Judge Court below.

SUMMARY OF ARGUMENT

The summary of the argument in this brief is fairly stated in the foregoing showing of interest on the part of amicus curiae. Essentially, Louisiana is supporting the validity of Arizona's bond election laws as meeting the constitutional requirements for the limiting of an election franchise. Further, the Court should apply the equitable doctrine of prospectivity to any decision, the effect of which is to invalidate Arizona's limited franchise bond election law.

ARGUMENT

(1) Merits of Case.

The fundamental error in the decision below is in failing to recognize the basic distinction between gen-

eral obligation bonds, whether of Arizona or of any other state, and Louisiana revenue bonds, as were involved in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647.

Revenue bonds under Louisiana law are payable from and secured by the pledge of the revenues derived from the operation of the revenue-producing public utility constructed, acquired, extended and improved with the proceeds thereof, subject only to the prior payment of the reasonable, necessary expenses of operating and maintaining the utility. All users, both property owners and others, pay the rates for the services provided and the Court found in *Cipriano* that all electors are substantially affected and directly interested in the outcome of an election to authorize bonds payable from the revenues of such a public utility.

Per contra, as to Louisiana property tax bonds, they are secured by "unlimited ad valorem taxes" levied against all property subject to State taxation. There is no limit to either the dollar amount of taxes or millage which may be levied against assessed property for the payment of principal and interest on such bonds. The direct responsibility for payment of such taxes is upon that class of electors who are property owners.

Special taxes necessary to meet debt service requirements for the bonds are separately levied, collected, deposited, and paid out in a fund that cannot be legally diverted to any other purpose, and no commingling of tax money with general fund money is permitted. The taxpaying voters primarily interested are

exclusively subject to the payment of all the taxes required, and to the seizure and sale of their property if the taxes are not paid.

It is readily apparent from the foregoing that there is a vast difference between the revenue bonds considered in *Cipriano* and the general obligation bonds as considered by the lower court in this case. This difference or distinction justifies the establishment of a classification which limits to property owners the right to vote on bonds secured by property taxation.

Consider also the distinction between the law and the facts governing the so-called ad valorem bonds involved in the present case, and the law and the facts governing the ad valorem bonds in Louisiana. Unlike the Arizona law where the tax to support the bonds is restricted exclusively to real estate (Article 7, Section 13, Constitution of Arizona; Title 9, Section 782, A.R.S.), the provisions of Louisiana law pertaining to the subject of ad valorem taxes such as are here involved, provide for the taxation of both movable and immovable property, real and personal property.

The stipulation of fact relied upon by the three-judge court in the present case establishes the fact that the plaintiff also paid "excise" taxes to the City of Phoenix on all items purchased within the said City of Phoenix that were subject to such excise taxes, and that these excise taxes, as well as any property taxes paid on personal properties, were commingled with a general fund out of which the City of Phoenix annually and historically paid the debt service, when due, upon its gen-

eral obligation bonds, including the bonds voted upon, and that for the fiscal year 1969-1970 only $2,350,000 of the annual general obligation debt service requirement of $5,594,973 was to be paid by levy of ad valorem taxes, with the remaining $3,244,773 to be paid from other sources, including the excise taxes.

Present amicus curiae believes that the reasoning of this Court both in *Cipriano, supra,* and in the companion case of *Kramer v. Union Free School District,* 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, when interpreted in relationship to the law of Louisiana governing general obligation bonds, will justify the Court in holding that the exclusion of non-property taxpaying qualified electors in Louisiana is actually necessary to promote a compelling state interest.

In evaluating the present record as to the merits of the present case, amicus curiae respectfully submits that this Court should consider the long line of cases recognizing the distinction between "voter qualifications" in the election of public officials, as in the case of *Kramer,* and "voter qualifications" where the business or financial affairs of a municipal corporation are involved, as in the case of *Cipriano.* The Federal Constitution does not guarantee to an elector the right to participate in every decision affecting the affairs of a political subdivision. The political right of an elector is secured by permitting him to vote for officials exercising public authority, or for officials who may be invested under the law with the power to make appointments.

The system in Louisiana, with which this Court is familiar, fully demonstrates this fact; and that indeed was exactly what the Court was dealing with in KRAMER, supra, where the Court recognized the validity of a school board member who might be appointed by publicly elected city officials, but affirmed the political right of a qualified elector to vote where an election was required, despite the fact that under the state law he was denied this right, as he did not own a fee or a lessee right, directly or through a spouse, in taxable real estate, and was not a parent or guardian of a child "enrolled for a specified time during the preceding year in a local school."

In the *Kramer* case the Court was emphasizing the interest of any qualified elector in matters related to the administration of local school board affairs; including fiscal, academic and budgetary controls. On the other hand, where the incurring of debt and the issuance of bonds for public purposes is involved, the issue is not the exercise of political suffrage, but is the participation in the determination of the imposition of an additional tax on property. Whether the compelling state interest justifies a limitation of the voting franchise depends upon whether there is a rational and reasonable classification as will secure all qualified electors against invidious discrimination.

In its consideration of the political right which was involved in *Kramer*, this Court furnished the constitutional answer to the question of how the average voter's right is to be protected as to public or governmental affairs of any kind, whether he owns property

or not, by applying the "one man, one vote" right, or equal voice right where public officials of any kind are to be elected, and where, if appointed, the equal voice right in electing the official or officials who are empowered to make such appointment. On the other hand, in questions involving a proprietary right, the Court has indicated that a reasonable classification is permissible.

There was no reason to prevent the qualified elector from voting for the school board member in KRAMER simply because he did not have a direct interest in real estate or a direct interest in school children. As a qualified elector his right of political suffrage was sacred in securing to him the privilege of voting for any public official where the office was elective rather than appointive; and where his total interest in the school system was a constitutional political right under the Fourteenth Amendment.

There is no need to argue with the use of the language "compelling state interest" if we keep in mind the issue with which the Court was dealing in these two types of cases — the one political, and thus inflexible; the other proprietary — in determining what would constitute a rational or reasonable classification.

Cipriano was no more than an extension of a long line of decisions by this Court challenging and annulling under the Fourteenth Amendment a state statute where an unreasonable or discriminate classification of rights is involved, and where there is thus a denial of equal protection of the law.

In the case of *Stewart, et al. v. The Parish School Board of St. Charles, et al.*, Civil Action No. 69-2818 on the docket of the United States District Court for the Eastern District of Louisiana[1], decided on February 25, 1970, which struck down the Louisiana provision that property ownership is a qualification for voting at a bond referendum to authorize general obligation bonds as violative of the Equal Protection Clause, the three-Judge Court treated a voting right in a property bond election as being of the identical category as a voting right where a public office is involved. This extension of the *Cipriano - Kramer* doctrine ignores the fact that in both of those cases the Court left the door open as to any case such as the present case, where the primary interest of the parties might be different.

The Court again recognized that there could be a valid limitation of the franchise in the recent decision of *Hadley, et al. v. The Junior College District of Metropolitan Kansas City, Missouri, et al.* (unreported); decided by this Court on February 25, 1970, where the majority opinion dealing with a political election reiterated that the state may in certain cases limit the right to vote to a particular group or class of people. It is submitted that the instant case must be of the type to which the court was referring; it would be difficult, if not impossible, to conceive of any other situation in which there were a more reasonable basis for such a limited franchise election.

In the mass of information by the various parties in-

---

[1]See Exhibit "A" for a complete copy of the opinion in this case.

terested in and possibly affected by the decision in this case, it would appear that there is one significant fact which may have been overlooked. In a property bond election the question is not whether there is a need for a specific public improvement or even whether the proposed improvement is good or bad. The question in a property bond election is whether a particular group (property owners) will consent to the imposition of a tax upon themselves to finance the acquisition of the proposed improvements. If the improvements are to be financed from current revenues or other sources, an election limited to property owners clearly poses constitutional problems; however, where the question is simply whether additional property taxes will be imposed to pay for public improvements, what could be more reasonable than submitting the question to those who will pay such taxes? If the election is defeated, this does not mean that the improvements will not be provided; it only means that the property owners alone are not willing to bear the total cost of improvements which admittedly will benefit the entire citizenry but that some other means of financing the project must be developed.

(2) Doctrine of Prospectivity

There are important differences between the laws of Arizona and the laws of Louisiana with respect to the time within which an election may be contested. These differences must be considered by the Court in determining the question of prospectivity in the application of any judgment of the Court which would invalidate Arizona's property bond election laws and which action

could perhaps affect similar laws of other states. The Arizona Revised Statutes, Sections 16-1202 and 16-1204 provide that an "elector" may contest an election held in a County, City, Town or political subdivision thereof and provide that the contest must be begun within *five days* of the canvass and declaration of the results of the election. Apparently the admittedly short five-day prescriptive period of Arizona law was ignored by the Court below in the instant case, but even if this prescriptive period is not a full-fledged peremptive period, there was no justification for the Court to apply the June 16, 1969, date of the *Cipriano* decree as the cut-off date for the validity of property bond elections in Arizona instead of applying the equitable doctrine of prospectivity as was done by this Court in *Cipriano*.

Under Louisiana law (La. Constitution, Article XIV, Section 14(n) and Louisiana Revised Statutes 39:518), any person in interest has the right to contest such an election for a period of *60 days* from the date the official election returns are published in a local newspaper, after which time the cause of action or right of action ceases to exist. This could be as long as *80 or 90 days* after the promulgation of the election returns by the governing authority. The Supreme Court of the State of Louisiana has consistently held that the cited provisions of law constitute a peremptive period after which no court can entertain an attack for any cause, including Federal constitutional grounds. See *Andrieux v. Parish School Board of East Baton Rouge*, 227 So.2d 370 (Louisiana 1969). The same peremptive period was recognized and applied by this Court in the *Cipriano* case, and was recently discussed and applied by a three-Judge Court in the case of *Hobbs v. Police Jury*

of Morehouse Parish, United States District Court for the Western District of Louisiana, Shreveport Division, Civil Action No. 14836, decided on January 23, 1970 (unreported).[1]

In the *Stewart case, supra,* the Court correctly applied the equitable doctrine of prospectivity in the light of the Louisiana peremptive period by making its decree applicable ". . . only to elections held after the date this decision becomes final and to those elections held prior to such date that are challenged during the time specified by law for challenging the election."

Perhaps the most significant case with respect to Louisiana's peremptive period is that of *Chambers v. Road District No. 505 of Tangipahoa Parish, Louisiana, et al.,* October Term, 1969, No. 1131. After noting probable jurisdiction in the present case on February 24, 1970, this Court in the *Chambers case, supra,* denied a Writ of Certiorari on March 2, 1970. This was a Louisiana case in which the Supreme Court of Louisiana had barred an attack on the constitutionality of Louisiana's limited franchise election law for property bonds after the expiration of the 60-day constitutional and statutory peremptive period. The action of this Court thus sustained the decision of the Supreme Court of Louisiana in that case. It would be illogical for this Court to reverse itself, in effect, by making its decision retroactive in the instant case. The far-reaching harmful effect of such a retroactive application has been carefully documented in other briefs submitted by interested parties in this case.

---

[1]See Exhibit "B" for a complete copy of the opinion in this case.

Thus, the material differences between the law of Louisiana and the law of Arizona insofar as property bonds are concerned, as well as the material differences between the property bond law of Louisiana and the revenue bond law of that State, as well as the wide variety of state laws governing similar bonds make it reasonable to assume that this Court will, if unconstitutionality is decreed, apply its decision prospectively.

CONCLUSION

The State of Louisiana respectfully urges the Court to uphold the validity of laws which restrict the voting franchise in general obligation bond elections to property owners on the grounds that such persons constitute a class of voters who have a direct interest in and are primarily affected by the outcome of the election and that the exclusion of non-property owners is necessary to promote a compelling state interest which, under our republican form of government, is essentially a matter reserved to the individual states for determination.

If the Court should affirm the decision of the lower court and in so doing invalidate state laws limiting the franchise in general obligation bond elections to property owners as a violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, the Court should give such decision prospective application only, following the equitable doctrine firmly established by this Court in recent cases.

Respectfully submitted,

JACK P. F. GREMILLION
Attorney General,
State of Louisiana
Post Office Box 4005
State Capitol Building
Baton Rouge, Louisiana 70804

EDWARD DONALD MOSELEY
Benton & Moseley
114 St. Louis Street
Baton Rouge, Louisiana 70801

HAROLD B. JUDELL
J. HUGH MARTIN
Foley, Judell, Beck, Morel & Bewley
Suite 2313, 225 Baronne Street
New Orleans, Louisiana 70112

By: _____
Attorneys for Amicus Curiae

CERTIFICATE

I, the undersigned counsel for Amicus Curiae, the State of Louisiana, do hereby certify that a copy of the foregoing brief has been served on all counsel in this matter by depositing a copy thereof in the United States Mail, postage prepaid, addressed to each of them at his respective address of record.

this ____ day of March, 1970

_____

Exhibit "A"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

FRANK T. STEWART, JOSEPH LEPINE, CAL BERRY, STANFORD CAILLOUET, SR., RAYFIELD LEWIS, EDDIE WILLIAMS, and GARLAND WEBER,
Petitioners,

vs. C.A. #69-2818
Section "E"

THE PARISH SCHOOL BOARD OF THE PARISH OF ST. CHARLES, AND SCHOOL DISTRICT NO. 1 OF THE PARISH OF ST. CHARLES,
Respondents

Filed: Feb. 25, 1970

Wilmer G. Hinrichs,
Attorney for Plaintiff,

Norman J. Pitre,
Melvin P. Barre, District Attorney
29th Judicial District, Edgard, La.,
J. Hugh Martin,
Harold B. Judell,
William P. Schuler, Assistant Attorney General,
Attorneys for Defendants.

Before WISDOM, Circuit Judge, and CASSIBRY and MITCHELL, District Judges.

WISDOM, Circuit Judge: This case involves the right to vote in a school bond election.

Louisiana laws, unlike the laws of thirty-six states, restrict eligibility to vote in bond elections to qualified voters who are "property taxpayers".[1] In such elections

---

[1] "Municipal corporation, parishes and school, road, subroad, sewerage, drainage, subdrainage (waterworks and sub-waterworks) districts, hereinafter referred to as subdivisions of the State, may incur debt and issue negotiable bonds, when authorized by a vote of a majority in number and amount of the property tax-payers qualified to vote under the constitution and laws of this State, who vote at an election held for that purpose after notice published or posted for thirty (30) days in such manner as the Legislature may prescribe, and the governing authorities of such subdivisions shall impose and collect annually, in excess of all other taxes, a tax sufficient to pay the interest annually or semi-annually and the principal falling due each year, or such amount as may be required for any sinking fund necessary to retire said bonds at maturity." Constitution of 1921, Art. XIV, § 14(a).

"Only property taxpayers qualified as electors under the constitution and laws of this State are entitled to vote in any election held under the provisions of this Part. The qualifications of taxpayers as voters are those of age, residence, and registration as voters, without regard to sex. There shall be no voting by proxy". L.S.A.-R.S. 39:508.

Thirteen states, besides Louisiana, restrict voting in bond elections to property taxpayers: Alaska Constitution, Article V, Section 1; Arizona Constitution, Article 7, Section 13; Colorado Constitution, Article XI, Sections 6, 7 and 8; Florida Constitution, Article IX, Section 6; Idaho Constitution, Article VIII, Section 3; Michigan Constitution, Article II, Section 6; Montana Constitution, Article IX, Section 2; New Mexico Constitution, Article 9, Section 12; New York Local Finance Law, Section 33:10; Oklahoma Constitution, Article X, Section 27; Rhode Island Constitution, Amend. Article XXIX, Section 2; Texas Constitution, Article 6, Section 3-a; Utah Constitution, Article XIV, Section 3.

the affluence of the voter is made the electoral standard by a requirement *no other State* imposes on the electorate: Political subdivisions in Louisiana may issue bonds only if they are approved by a "majority in number and *amount of the property*" of the taxpayers who vote in the election.[2] These laws deny the vote to parents, lessees, and others who have a direct and substantial stake in public education generally and in the proposition put to a vote, but by necessity or choice do not own real estate in the political subdivision where the election is held.[3] By gearing the weight of each elector's vote to the amount of his assessed property the laws debase the vote of small landowners. We hold therefore that the exclusion of all non-property taxpayers and the dilution of the small property holder's vote violate the Equal Protection Clause of the Fourteenth Amendment.

* * *

The parties have stipulated the facts and have agreed to submit the case to the Court to be "disposed of on the

---

[2]That is, "their votes must represent a majority of the assessed property owned by those taxpayers who are actually voting". Cipriano v. City of Houma, 1968, 395 U.S. at 703, fn. 2.

[3]We take judicial notice of the fact that in Louisiana few individuals pay any personal property taxes; those who do pay a nominal tax usually based on the value of their automobile. Louisiana law, however, provides that "all properties situated — within the state . . . shall be subject to taxation". L.S.A. R.S. 47:1951-1956. Tax assessors in this state primarily place business, commercial, and corporate *personal* property (merchandise inventory) on the assessment rolls. Considerable personal property is exempt from taxation. Article 10, Section 4 of the Louisiana Constitution. In effect, the term "property taxpayer" equates with the term "real property taxpayer" or "landowner".

matter of the issuance of a permanent injunction, the parties waiving their respective interests to a hearing on a temporary injunction".

The St. Charles Parish School Board on September 23, 1969, conducted a special election to decide whether the Parish School Board should be authorized to issue bonds to the amount of $5,250,000 for capital acquisition and improvement of public schools in the parish.[4] There are 10,275 registered voters in the Parish; 7808 are white and 2421 are Negro voters. The election was hard fought, perhaps because residents on one side of the Mississippi River were at odds with residents on the other side of the River.[5] (All of the plaintiffs reside on

---

[4]The proposition submitted to the resident property taxpayers of the School District read as follows:

> Shall School District No. 1 of the Parish of St. Charles, State of Louisiana, incur debt and issue bonds to the amount of Five Million Two Hundred Fifty Thousand Dollars ($5,250,000.00), to run twenty-five (25) years from date thereof, with interest at a rate not exceeding six per centum (6%) per annum, for the purpose of acquiring and/or improving lands for building sites and playgrounds, including construction of necessary sidewalks and streets adjacent thereto; purchasing, erecting and/or improving school buildings and other school related facilities within and for said School District, and acquiring the necessary equipment and furnishings therefor, title to which shall be in the public?

[5]An editorial from the St. Charles Herald, September 4, 1969, made part of the complaint, states: "Actually, the board plans to build one new high school on the West Bank. Any money left over will be used to build facilities at the GATX school that were supposed to be built at Norco, Destrehan and St. Rose out of money from the last bond issue. ¶ There is no doubt that the schools in St. Charles parish need the five and a quarter million dollars. ¶ There is also no doubt that the expenditure of this money in St. Charles by the present superintendent's office will mean that politics, not pure educational needs, will

the East bank.). Despite the public interest in the election, only 2,385 electors voted.[6] The official tabulation showed that 1,271 voters, representing an assessed valuation of $1,650,168.50, voted in favor of authorizing the bond issue; 1,114 voters, representing an assessed valuation of $1,261,310, voted against the bond issue. The bond issue was approved therefore by a majority of 157 votes in number presumably representing an assessed valuation of $388,858.30.

The plaintiffs brought this action on November 21, 1969, against the Parish School Board and School District No. 1, the sole and parish-wide school district in St. Charles Parish, to set aside the election and to enjoin the defendants from offering or selling the bonds.

The plaintiffs fall into two classes: (1) non-property taxpayers, who were ineligible to vote and (2) property taxpayers, who were eligible to vote but whose assessments were less than the assessments of others who voted in the election. In each class some of the plaintiffs have children enrolled in the public schools in St. Charles Parish; some do not.

---

be served by the money." An editorial from the Herald dated September 25, 1969, states: "West Bank voters, who will receive almost all of the bond issue, voted to build a central high school on their side of the river. . . . No single precinct on the East Bank favored the bond issue."

[6] The record does not indicate the number of non-property taxpayers registered to vote in St. Charles Parish. The disparity between the total number of registered voters and the number of votes cast in the election suggests that a large number of registrants were ineligible to vote in the election.

I.

Certain principles stating voting rights apply to elections across the board. The one man, one vote canon of Reynolds v. Sims, 1964, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506, is such a principle: it bars dilution of the franchise. Avery v. Midland County, 1968, 390 U.S. 474, S.Ct. , L.Ed.2d , extends the Reynolds v. Sims canon to subdivisions of a state including, of course, school districts. In Harper v. Virginia Board of Elections, 1966, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169, the court, striking down the poll tax, concluded: "[S]tate law violates the Equal Protection Clause ... whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.' . . . Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race ... are traditionally disfavored." These three decisions are basic to our conclusions in this case.

II.

Two recent decisions of the Supreme Court control this case: Kramer v. Union Free School District, 1969, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583, and Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647.

In Kramer the Court considered a New York statute limiting the vote in local school board elections to parents and guardians of children attending public

schools in the district and to residents who owned or leased taxable real property. The defendants contended that parents and guardians constituted a group "primarily" interested in school affairs, an interest not shared by the public generally. In *Kramer*, as in the case before this Court, the School District and the State contended that property owners and lessees of taxable property had a special interest in decisions affecting public schools, since the funds for such schools were derived almost entirely from the taxes paid on real property. The three-judge district court held that restricting voting to these two groups was "rational" and "within the limits of the State's power to fix" qualifications for voting. The court characterized the election of a school board as a special purpose election, distinguishing *Harper* which involved a general election. 292 F.Supp. 70 (E.D.N.Y. 1968) on remand from 379 F.2d 491 (2nd Cir. 1967).

The Supreme Court, in a five to three opinion by Chief Justice Warren, held that the voting qualifications denied equal protection to the excluded voters. The Court pointed out, quoting from Reynolds v. Sims, that state statutory and constitutional provisions prohibiting the exercise of the voting franchise to some electors, while allowing it to others, must be "carefully and meticulously scrutinized"[7] to determine "whether the exclusions are necessary to promote a compelling state interest."[8] The Court found that the restrictions imposed by the New York statute "did not meet the exacting standard of precision we require of

---

[7]395 U. S. at 626.
[8]395 U.S. at 630.

statutes which selectively distribute the franchise. The classifications ... permit inclusion of many persons who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions".[9] The Court said: "The issue is not whether the legislative judgments are 'rational'. A more exacting standard obtains. The issue is whether the ... requirements do in fact sufficiently further a compelling state interest to justify denying the franchise to appellant and members of his class." Are those excluded "substantially less interested or affected than those the statute includes. In other words, the classifications must be tailored so that the exclusion of appellants and members of his class is necessary to achieve the articulated state goal."[10]

In *Cipriano* the law under attack was identical with the pertinent provisions under attack in the instant case in that it gave only "property taxpayers" the right to vote in elections called to approve an issue of revenue bonds by a municipal utility. The district court accepted the argument that because of the "special pecuniary interest" property owners have in a utility system the classification was a "rational" one. On the facts, the Supreme Court might have held that the classification failed to meet the test of rationality. Instead, the Court reiterated the exacting *Kramer* standard: The "Court must determine whether the exclusions are necessary to promote a compelling state interest".[11]

---

[9]395 U.S. at 632.
[10]395 U.S. at 633.
[11]395 U.S. at 704.

The voting restriction failed to meet that test.

In *Kramer* and *Cipriano* the Court declared that it was unnecessary to decide whether a state might in some circumstances limit the franchise to those "primarily interested". But the standard established in those cases cannot be confined within the contexts of a school board election, which the defendants characterize as a "political" election, and a revenue bond election, which the defendants characterize as "proprietory" in nature. Thus, in *Kramer* the Court said: "Our exacting examination is necessitated not by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not." 395 U.S. at 629.

Kramer and *Cipriano*, with the aid of Reynolds v. Sims, *Avery*, and *Harper*, teach that laws restricting the right to vote — we say, in any election — do not carry the usual presumption of constitutionality. In other situations, for example, a graduated tax, the defenders of a statutory classification have the light burden of finding that the legislative scheme has a rational basis.[12] Here they must meet "the exacting standard of precision" required of "statutes which selectively dis-

---

[12] *Harper* and the redistricting cases presage "a preferred position for voting rights as key or fundamental rights, somewhat analogous to the special position now afforded to first amendment rights." A. Kaplan, Note, 4 Harv. Civ. Lib. L. Rev. 431, 442 (1969). The equal protection clause has a "positive aspect" in the area of voting rights. Note, 55 Va. L. Rev. 559 (1969).

"Equal protection requires a higher standard for classifications denying or diluting a citizen's vote than has traditionally been required for legislative classifications involving less fundamental political matters." Kramer v. Union Free School Dist., 282 F. Supp. 70, 81 (1968). (J. Weinstein, dissent).

tribute the franchise". Here the Equal Protection Clause is not satisfied by a finding that it was reasonable to recognize the special interest property owners have in a bond issue; the laws are unacceptable if they exclude non-property electors who have a substantial stake in the result of the election. It has been suggested that in *Kramer* the Court "conflat[ed] objective stake with subjective concern", signalling that, "even if a test could select for objective stake, it is not acceptable to exclude those concerned about the outcome even if they have no stake in the election.... A significant result of this reading of *Kramer* is that property qualifications *simpliciter* may no longer be acceptable eligibility tests, even in such traditional areas as school millage or sewer assessment elections.... It would make no difference that a community's tax structure was such that only property owners directly paid for such proposals. The Court's concept of 'interest' will not permit the exclusion of residents who do not own property, since they share a concern for and stake in the quality of the schools the young attend and the operation of the sewers which make the city habitable." Comment, The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 80 (1968).

In *Kramer* the Supreme Court noted that the effect of the New York statute was to disfranchise "appellant and others who similarly live in their parents' home . . . (unless they are parents or guardians of children enrolled in the district pupil school); senior citizens and others living with children or relatives; clergy, military personnel, and others who live on tax-exempt property; boarders and lodgers; parents who neither own or lease qualifying property and whose children

are too young to attend school; parents who neither own nor lease qualifying property and whose children attend private schools". 395 U.S. at 630. These are all groups of persons who are excluded by Louisiana law from participating in any bond elections. Indeed, in a school bond election, Louisiana law is even more restrictive than the New York law which recognizes that lessees[13] and parents and guardians of children in public schools have, "objectively", a "direct" stake in school affairs. 395 U.S. at 631. Subjectively, parents and guardians have a special concern that the schools their children attend will be improved and properly maintained. They are in a position analogous to that of the non-property owners in Houma who pay utility bills and are directly affected by the operation of the utility systems. *Cipriano,* 395 U.S. at 705.

There is a recent sequel to *Kramer* and *Cipriano* involving the constitutionality of a Georgia law limiting school-board membership to freeholders. Turner v. Fouche, January 19, 1970, L.Wk. . "Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding can survive constitutional scrutiny", the Supreme Court held that the freeholder require-

---

[13]The contention that in a bond election property taxpayers are more likely to vote responsibly than non-property owners rests on the assumption that only property owners pay the property tax. This assumption, is false, for the tax is passed on to tenants in the form of rent. "Contrary to popular misunderstanding, a renter pays just as much in property taxes as an owner, although it is hidden in the rent." C. Adrian & C. Press, Governing Urban America, 90 (1968). The transiency of tenants as a factor in determining interest is taken into account by residence qualifications for voting.

ment for membership on the county board of education amounted to invidious discrimination. "It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property. Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than freehold. Whatever objectives Georgia seeks to obtain by its 'freeholder' requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal." Turner v. Fouche, , U.S. at .

There are obvious differences between the case before the court and *Kramer, Cipriano,* and *Turner.* It is significant, however, that in none of the cases did the Supreme Court recognize a constitutional difference between a general election and a special-purpose election. In the recent case of Kolodziejski v. City of Phoenix, Nov. 17, 1969, D.C. Ariz., F.Supp. , a three-judge court considered Arizona constitutional and statutory provisions limiting the electorate in bond elec-

tions to real property taxpayers.[14] The court could "find no evidence which would justify a distinction between Revenue Bonds and General Obligation Bonds". Going "no further" than *Kramer* and *Cipriano*, the court held that there was "no evidence" to "justify the conclusion that the exclusions under Arizona law are necessary to promote a compelling State interest". Contra: Settle v. City of Muskogee, Okla S.Ct. dec'd Dec. 23, 1969, No. 43,842; Settle v. Board of Commissioners, Co. of Muskogee, Okla S.Ct., dec'd Dec. 23, 1969, No. 43,812; Muench v. Martin Paine, S.Ct. Idaho, No. 10,552.

The State's compelling interest in fixing the qualifications of voters in school bond elections is to delegate to the voters in each school district the authority to improve public education in their district. That objective is certainly not promoted by excluding parents and guardians of school children and others who cannot be characterized as having a substantially less interest in public education than property taxpayers. In terms of the effect of the St. Charles election, the excluded groups may be more seriously affected than the taxpayers, many of whom may have a proper interest in avoiding arbitrary taxes but little or no interest in public schools. The State's objective of improving public education could, of course, be frustrated if a small minority of property taxpayers turned a-

---

[14]The proposition voted on in the Kolodziejski case included both revenue bonds and ad valorem or general obligation bonds. The purpose was to improve water systems, airport facilities, sewer systems, parks and playgrounds, municipal buildings, fire, police, public safety, library, sanitary landfills, and maintenance and service facilities.

gainst the public school system.[13] That objective might also be frustrated if a majority of all voters reacted against public education. But a republican form of government, at least in today's world, rests on widening the suffrage and faith in the democratic process.

True, the school bonds are secured by ad valorem taxation. Property taxpayers are faced with additional taxes for the years authorized by the bond issue; they are subject to having a lien on their property for the life of the issue. But if protection of the property taxpayer had been the legislature's chief interest, the law would not have excluded business entities. These are the taxpayers who pay the largest share of taxes in most voting districts.

The presumption that property owners are more competent to vote in a bond election than non-property owners leads to irrational results. "It would disfranchise the president of a bank who happened to rent rather than own his own home."[16] All residents of a school district have an interest in public education.

---

[15]The amicus brief of the Louisiana School Boards Association, however, makes the point that: 'The property owning citizens of Louisiana have consistently supported their local school systems in their communities by providing the capital improvement revenues needed to build, equip, and maintain the buildings in which the children must be housed in order to be properly educated. Historically, this burden of providing the buildings and equipment for the education of our children has been placed upon the shoulders of the property owning taxpayer. An examination of our sixty-six local public school systems will show clearly that the property owning taxpayers have willingly shouldered this burden in spite of opposition from segments of labor, conservatives, liberals and particularly against those who would pay no taxes at all.

[16]Note, 55 Va.L. Rev. 559, 566 (1969).

Here, for example, the general public interest must be weighed against allowing a particular private group to decide whether a public school be built and where — according to the School Board's pre-election announcements. The location of a new school may have a decisive effect on continuing or diminishing school segregation. In rural areas and in cities, to a lesser extent, the local high school is the focal point for community activities. Federal and state funds supply substantial aid to public education. All taxpayers contribute to these funds, but under the challenged law the decision to finance through a bond issue the construction of new schools and improvements of old schools is delegated to landowners.

Thirty-six states have not considered property a necessary qualification for voting in a bond election.[17] These states rely on checks and balances to prevent arbitrary and excessive taxation. Similar controls exist in Louisiana which make the exclusions unnecessary. (1) The Louisiana Constitution limits bonded indebtedness. La. Const. of 1921, Art. XIV., § 14. (2) Before a School District can call a special election to incur bonded indebtedness, the approval of the State Board and Tax Board must be obtained. La. R. S. 47:1804. The board is composed of the Governor, Secretary of State,

---

[17]No state today has property qualifications for voting in general elections. XVII Council of State Governments, The Book of the States, 1968-69, 30 (1968). "In time [however] leveling influences prevailed, and most Americans refused to accept the contention that there was a necessary relationship between property ownership or payment of taxes and interest in government or capacity to govern. North Carolina, in 1865, was the last state to abolish property ownership as a qualification for voting in state and national elections . . ." Phillips, Municipal Government and Administration in America 175 (1960).

Attorney General, Legislative Auditor, and the Secretary of the Board appointed by the Governor. In National Bank of Commerce v. Board of Supervisors, 1964, 206 La. 913, 20 So.2d 264, the Louisiana Supreme Court pointed out that the Board has (a) the discretion and authority to prohibit the incurring of excessive debts, the levying of burdensome taxes, the excessive mortgaging of property and the excessive and unwarranted pledging of revenues in the interest of protecting the public fisc and the full faith and credit of the State and its political subdivisions, and (b) the function and duty to investigate and find the facts and circumstances affecting each individual case before deciding whether the application should be granted or denied.

It must also be kept in mind that the electorate, whether it be the property-taxpayer electorate, as now, or the general electorate as urged by the plaintiffs, has no authority under Louisiana law to initiate any proposal to incur debt or issue bonds. That initiating authority resides in the legislative process delegated to the parish and local school boards (and other political subdivisions with bonding authority). In this governmental process the basis for controls against any abusive assault on the property taxpayer is the responsiveness of elected officials, such as the school board members of the defendant board, to the will of the electorate as a result of having to offer themselves for election and reelection, and by being subject to recall.

III.

Other characteristics of the challenged Louisiana law demonstrate that it does not meet the exacting standards of *Kramer* and *Cipriano*.

The requirement that the bond issue be approved by a majority of the taxpayers voting representing a "majority of the assessed property owned by those taxpayers who are actually voting" apparently rests on the assumption, first, that property owners have a special pecuniary interest; second, that the larger the assessment the greater the interest and the greater the need to protect large property owners from irresponsible owners having no property. *Kramer* and *Cipriano* cut through the basic assumption. It is not enough to show that included groups have an interest. It must be shown that the exclusions are necessary to promote a compelling state interest. In terms of voting responsibly, there is no necessary correlation between the amount of an assessment and the degree of interest a taxpayer may have in a particular bond issue. A ten thousand dollar house to one person may mean more to that person than a hundred thousand dollar house to another.

The actual effect of gearing assessments to the vote is simply to dilute the participation of small landowners and to exaggerate the participation of large landowners in violation of the one man, one vote canon.[18]

---

[18]Cf. Lance v. Board of Education of County of Roane, S.Ct. W. Va. 1969, 170 S.E.2d 783, reh'g denied. The Supreme Court of Appeals held, inter alia, that the three-fifths vote requirement of the West Virginia Constitutions and statutes dealing

In a small rural parish these effects are especially conspicuous. This is a type of invidious discrimination condemned in *Harper*: "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter's qualification is to introduce a capricious or irrelevant factor." 383 U.S. at .

Basing the vote on the tax assessment produces anomalous results stemming from the homestead exemption. A homeowner is entitled to an exemption of either $2,000 or $5,000 of the assessed value of his home, depending on whether he is a veteran.[19] Of course, a significant number of individual property owners enjoy this exemption and pay taxes only on the excess valuation. All of these homeowners are permitted to vote the full value of their assessment whether in fact they

---

with bond elections was unconstitutional. The effect of the requirement is "to debase or dilute the weight or force of an affirmative vote when considered in relation to the weight or force of a negative vote." The Court relied on *Kramer, Cipriano,* and *Harper,* among other decisions. The Court said: "We are of the opinion that 'one person, one vote' principle is now firmly established in broad general terms without qualification or exception. Certainly the right of the voter to equal protection, the right to protection against the dilution or debasement of the weight or force of an individual's vote, is fully as sound, sacred and important when he is voting on issues involving taxation, public revenue and the promotion of an adequate public school system, as when he is voting for the nomination or election of a constable, a state senator, a governor or any other public official to represent the voter in government. ¶ We are unwilling to concede that a determination of issues such as those involved in this case cannot be safely entrusted to a majority of the voters."

[19] La. Const. of 1921, Art. X, § 4, para. 9, 9(a), 9(b); L.S.A.-R.S. 39:253.

pay little or no taxes. The result is that this group of homeowners vote but pay no more taxes than the plaintiffs who own no property.

The State reimburses school boards and other political subdivisions from the State Property Tax Relief Fund for the loss of taxes represented by the total assessed value of the homestead exemption. This fund is made up of the Public Utilities Tax,[20] the Alcoholic Beverage Tax,[21] and the State Income Tax.[22] Thus, a substantial amount of the voters' ad valorem property taxes is actually paid by the Property Tax Relief Fund.[23] All taxpayers, therefore, contribute to the property tax but only those who own assessed property may vote in school bond elections.

IV.

There are two constitutional issues in this case: first, the restriction of the franchise to property taxpayers; second, the requirement that the majority of the voters represent a "majority of the assessed property". Since the Court agrees with the Plaintiffs on the first issue, it might be said that it is unnecessary to

---

[23] The homestead exemption is, of course, not a part of the law now being challenged. We should also point out that the Property Tax Relief Fund is under the legislature's control both as to sources of revenues deposited to its credit and eligibility to share in its proceeds. The plaintiffs do not attack the validity per se of voting homestead exempt property. They argue that the state's allowing such property to be voted demonstrates that the state's compelling interest here was not simply to protect "taxpayers".

[20] L.S.A.-R.S. 47:1009, 1010.

[21] L.S.A.-R.S. 26:460.

[22] L.S.A.-R.S. 47:284, 285.

reach the second issue. But the two limitations have been inseparable since 1898. Moreover, weighting the vote in favor of the large property owner points up the unsoundness of limiting the vote to property taxpayers. If this limitation were constitutional, the same arguments supporting its constitutionality would support basing the election on the value of a voter's assessment.[24] It is conceivable that in a small rural school district a handful of taxpayers would have the veto power over public school improvements. In any voting district, the small homeowner would have his vote diluted. At this point in history, this is an intolerable discrimination. In short, we hold in favor of the plaintiffs on both issues. The special interest property taxpayers have in bond elections is not the compelling State interest that would justify excluding a large portion of the electorate that has a substantial stake in public education.[25]

We hold that the general election laws of Louisiana are to be applied in general obligation bond elections; all qualified registered voters are entitled to vote in

---

[24]Indeed, in their brief the defendants argue that the requirement of a majority in the amount of assessment is an "equitable voting procedure in an election whose participants are limited to property owners".

[25]In *Kramer* the Court noted that in school elections "objective" stakes are held by parents, future employers, neighbors, and in the sense that a nation's progress depends on its young, all citizens. The Court, however, also regarded "subjective" concern as relevant: "[A]ppellant resides with his parents in the school district, pays state and federal taxes and is interested in and affected by school board decisions; however, he has no vote. On the other hand, an uninterested unemployed young man who pays no state or federal taxes, but who rents an apartment in the district, can participate in the election." 395 U.S. at 632, fn. 15. See Comment, 83 Harv. L. Rev. 7, 80 (1969).

such elections, as they are now entitled to vote in Louisiana revenue bond and sales tax elections.

We do not reach the question whether the secrecy of the ballot is a constitutional principle and that the method of voting assessments violates that principle.

V.

Significant hardships would be imposed on political subdivisions, bondholders and others connected with the financing of local government if our decision today was given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis for avoiding injustice or hardship by a holding of non-retroactivity. *See* Cipriano v. City of Houma, 1969, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 and the authorities therein cited. Elections for approval of bonds and special taxes have been held in good faith by many public bodies as required by state law, and as a result budgets have been adopted and obligations incurred in reliance upon such elections. To upset these elections would disrupt orderly government and would not be in the public interest. Therefore, we hold that this decision should be applied prospectively: only to elections held after the date this decision becomes final and to those elections held prior to such date that are challenged during the time period specified by Louisiana law for challenging the election. Of course, our decision will not affect the validity of bonds or other securities which have been issued and are now outstanding.

JUDGMENT

IT IS ORDERED that Article 14, Section 14(a) of the Constitution of the State of Louisiana and Title 39, Section 508 of the Revised Statutes of the State of Louisiana are violative of the Fourteenth Amendment of the United States Constitution insofar as said provisions of law restrict elections to property taxpayers who are otherwise qualified electors of the political subdivision, and insofar as said provisions of law require the weighing of the vote cast in the amount of the assessed valuation voted.

IT IS FURTHER ORDERED that the special election held on September 23, 1969, pursuant to the resolution adopted by the Parish School Board of the Parish of St. Charles, acting as the governing authority of School District No. 1 of the Parish of St. Charles on July 28, 1969, and the same is hereby declared to be null and void and to have no force and effect.

IT IS FURTHER ORDERED that all of the Defendants, their successors, agents, or attorneys be and they are hereby permanently enjoined from taking any further action to advertise, issue, sell, or deliver any bonds purported to have been authorized by the said special bond election held on September 23, 1969, and from levying any ad valorem tax under the authority of said election.

IT IS FURTHER ORDERED that this decision and decree shall operate prospectively as set forth in the Court's opinion (findings of fact and conclusions of law).

Dated: New Orleans, Louisiana,
This 25th day of February, 1970.

(Signed) JOHN MINOR WISDOM
UNITED STATES CIRCUIT JUDGE
(Signed) FRED J. CASSIBRY
UNITED STATES DISTRICT JUDGE
(Signed) LANSING L. MITCHELL
UNITED STATES DISTRICT JUDGE

Exhibit "B"

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION

IVORY HOBBS

versus CIVIL ACTION
No. 14,836

POLICE JURY OF MOREHOUSE PARISH, ET AL.

STATE OF LOUISIANA, Intervenor

Filed: Jan. 23, 1970

FOR PLAINTIFF

MESSRS.
R. Hunter Pierson
720 Murray Street
Alexandria, Louisiana 71301

Knight E. Doggett
Doggett & DeLaunay
728 Murray Street
Alexandria, Louisiana 71301

FOR DEFENDANTS

Albin P. Lassiter
District Attorney
Ouachita Parish Courthouse
Monroe, Louisiana 71201
Harold B. Judell
William H. Beck, Jr.
Foley, Judell, Beck, Morel
& Bewley
225 Baronne Street - Suite 2313
New Orleans, Louisiana 70112

FOR INTERVENOR

State of Louisiana
Jack P. F. Gremillion
Attorney General of Louisiana
Post Office Box 44005
State Capitol Building
Baton Rouge, Louisiana 70804
John R. Hunter, Jr.
Assistant Attorney General
Post Office Box 54
Alexandria, Louisiana 71301

THREE-JUDGE COURT: Robert A. Ainsworth, Jr.
Circuit Judge
Ben C. Dawkins, Jr.
Chief District Judge
Richard J. Putnam
District Judge

OPINION

The favorable results of an election in Morehouse Parish, Louisiana, authorizing the issuance of bonds to be paid from ad valorem taxes on property in that Parish, for the purpose of enlarging a public hospital, were promulgated July 8, 1969. July 22, 1969, Ivory Hobbs, a resident of Morehouse Parish, purportedly brought this would-be class action to procure a judgment declaring unconstitutional the provisions of Louisiana law[1] which give only "property taxpayers" the right to vote in elections called to approve the issuance of municipal bonds to be funded solely from property taxes. The complaint also seeks other relief, including an injunction preventing the issuance of bonds authorized in the above election, which would result from a judgment as sought. Pursuant to 28 U.S.C. § 2284, a Three-Judge District Court was convened to consider and decide this case.

September 24, 1969, defendant Police Jury filed a motion for summary judgment, supported by the affidavit of the Registrar of Voters for Morehouse Parish, on the ground, *inter alia*, that Hobbs was not a reg-

[1]La. Const. Art. 14, § 14; La.R.S. 38:508; La.R.S. 33:4258.

istered voter and was a non-registered property owner and therefore had no legal standing to bring this action, either in his own right or as a member of the class he purported to represent, as required by Rule 23(a) of the Federal Rules of Civil Procedure.

On motion filed December 1, 1969, one member of this Court *ex parte* allowed to be substituted as party plaintiff one Louie Gene Simpson, the motion alleging that he was a non-property-owning registered voter of Morehouse Parish. However, one week later, December 8, 1969, Simpson filed an affidavit with this Court stating that he never had consented to his name being used as plaintiff in this suit, and that he desired his name to be withdrawn therefrom. December 15, 1969, defendant filed its motion in opposition to the substitution. Approximately three weeks after Simpson's request to have his name withdrawn as party plaintiff, January 5, 1970, Ollie Earlean Tennant petitioned this Court to allow her to intervene as party plaintiff in this action. No action on this motion to intervene has been taken until now by any member of this Court.

Defendant contends that to allow either Simpson or Tennant to enter this suit would be to constitute a new action which is barred by the provisions of Louisiana law.[2]

---

[2]La. Const. Art. 14, § 14(n):

> "*Contest of bond issue or tax; time.* For a period of sixty (60) days from the date of promulgation of the result of any election held under the provisions of this section, any person in interest shall have the

These laws prohibit any person from contesting the validity of an election, called for the authorization and issuance of ad valorem tax-supported bonds, after sixty days from the date of promulgation of the results of such election. Here, as shown, the initial suit by Hobbs was within the sixty-day period but the attempted substitution of Simpson and intervention by Tennant were well beyond the sixty-day time limit.

Before reaching the merits of this case, or the Constitutional question sought to be presented, this Court must resolve the following issue: May a plaintiff, not a registered voter and a non-registered property owner, and consequently not a member of the class he seeks to represent, timely institute a class action to contest a Louisiana ad valorem tax bond election which will serve as a proper basis for a subsequently-substituted plaintiff or would-be intervenor who attempts to enter the suit long after expiration of the legal delay allowed by State law for contesting such elections?

---

right to contest the legality of such election, the bond issue provided for, or the tax authorized, for any cause; after which time no one shall have any cause or right of action to contest the regularity, formality, or legality of said election, tax provision, or bond authorization, for any cause whatsoever. If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters. The provisions of this section shall not apply to the City of New Orleans."

See also La.R.S. 39:518, to the same effect.

It is axiomatic that one who attempts to sue in behalf of members of a class must be a member of the class he purports to represent. *Hammer* v. *Campbell*, 358 F.2d 215 (5 Cir. 1966) cert. denied 385 U.S. 851; 2 Barron & Holtzoff, *Federal Practice and Procedure* § 567, at 308 (Wright rev., 1961). *Cf. Bailey* v. *Patterson*, 369 U.S. 31 (1962); *Cf. Richard Johnson, Jr.*, v. *Georgia Highway Express, Inc.*, ___ F.2d ___, (5 Cir. 1969). See generally Wright, "Class Actions," 47 F.R.D. 169. Plaintiff Tennant contends that, while this may be so, timely institution of a suit which gives knowledge of the demand to the defendant, and in which proper service of process is made, is sufficient to interrupt prescription (a misnomer, as will be shown *infra*) so that a later substituted plaintiff or would-be intervenor may proceed with the action as if he had brought the suit timely himself. Tennant's counsel cite Louisiana laws and jurisprudence supporting her contention. Defendant reasserts its position by citing the following passage from Barron & Holtzoff, *Federal Practice and Procedure* § 451:

> "If the effect of an amendment is to substitute a new party for one originally named, it has been held to constitute a new and independent claim for relief which cannot be allowed after the statute of limitations has expired."

We note that this excerpt from Barron & Holtzoff was written before the 1966 amendments to the Federal Rules of Civil Procedure. In that year Rule 15(c), F.R.Civ.P., was amended to read, in part:

> "* * * An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, *within the period provided by law for commencing the action against him,* the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added.)

As noted in *Crowder* v. *Gordon's Transport, Inc.*, 387 F.2d 413 (8th Cir. 1967), the Advisory Committee note on the Rule 15(c) amendment states in part:

> "The relation back of amendments changing *plaintiffs* is not expressly treated in revised Rule 15(c) since the problem is generally easier. *Again the chief consideration of policy is that of the statute of limitations,* and the attitude taken in revised Rule 15(c) toward the change of defendants extends by analogy to amendments changing plaintiffs." (Emphasis added.)

From the above, it plausibly might be argued that commencement of a class action by a party without standing to sue would interrupt the running of prescription.

Counsel for all parties cite *Slack* v. *Stiner*, 358 F.2d 65 (5 Cir. 1966), to support their contentions. In that case, individual plaintiffs brought an action against defendants before the statute of limitations had expired. The defendants were on notice of the basis of the suit, but during the course of the trial the action was converted into a class action. The Court of Appeals for the Fifth Circuit held that there was no class action before the Court until after the statute of limitations had run, and consequently the plaintiffs who intervened after that time were not entitled to recover. However, as noted by plaintiff, the Court stated:

> "If, at the outset, the two suits had been class actions the question as to whether the suits were 'commenced' so as to toll the running of the limitation period might have been a difficult one."

Consequently, *Stiner* gives us little help.

All of the jurisprudence cited by both parties in support of their respective positions relates to cases dealing with statutes of limitations. In Louisiana, these time limits commonly are referred to as *prescriptive* periods. Though counsel have not mentioned it, we must note that the period of time involved in this case is what is known in Louisiana as a *peremptive* period. This characterization of the time limit for contesting the type of election involved in this case was most recently classified as a peremptive period by the Louisiana Supreme Court in *Andrieux* v. *East Baton*

Rouge' Parish School Board, 227 So.2d 370 (1969).[3]

As was said in *Succession of Pizzillo,* 223 La. 328, 65 So.2d 783, 786 (1953):

> "* * * The difference between prescription and peremption is that the former simply bars the remedy whereas, in the latter, time is made of essence of the right granted and a lapse of the statutory period operates as a complete extinguishment of the right."

See, further, discussion on this subject in 29 *La. Law Review* 230 and authorities therein cited.

Had this case dealt with a simple prescriptive period, we may have been inclined to hold that institution of a class action by an improper party interrupted the running of prescription so as to allow a later, proper plaintiff, with appropriate standing, to prosecute the suit. However, we here are dealing with a peremptive period which has as its two distinctive characteristics (1) the complete extinguishment of the right of action after the time period has run, and (2) as was said by Professor Joseph Dainow, in 29 *La. Law Review* 230, in his discussion of "peremption" or "forfeiture," ". . . there can be no — repeat, no — interference with the running of time; there can be no interruption by suit or acknowledgment, nor suspension for minority or for other reasons."

---

[3] "We have strictly adhered to the view that the constitutional and statutory *peremptive* period operates as a complete extinguishment of the right to attack bond and tax elections." At pp. 370, 371 (authorities omitted). (Emphasis added.)

Consequently, we must hold that institution of this purported class action in behalf of Ivory Hobbs, who was not a member of the class he purported to represent, was not a sufficient basis upon which to allow a later substituted or intervening plaintiff to proceed with the action. Moreover, *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969), on which counsel for Hobbs, Simpson and Tennant rely in this suit for relief on the merits, expressly held that the rule enunciated by that decision would be applied only when the time for challenging the election result has not expired under state law.[4]

The peremptive period established by the Louisiana laws noted is based upon the strongest considerations of public policy in that it is in the public interest to protect the fisc against uncertainty and to protect the bonds to be issued from attack after a reasonable time allowed within which to contest the validity thereof for any cause. Here, it is obvious that the moving force behind this law suit had ample persons from whom to choose as his nominal plaintiff within the peremptive period allowed by law to contest the election. No mem-

---

[4] "Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect. Where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940). *Cf. Linkletter* v. *Walker*, 381 U. S. 618 (1965). Therefore, we will apply our decision in this case prospectively. *That is, we will apply it only where, under state law, the time for challenging the election result has not expired,* * * *." At page 706 (emphasis added).

ber of the class allegedly harmed having contested the bond election timely, we therefore disallow the motion to intervene and grant defendant's supplemental motion to dismiss and for summary judgment, it being improper to reach the merits of this case.

There are three additional reasons for dismissal. First, as noted, and is uncontested, Ivory Hobbs was neither a registered voter nor a registered property owner when this suit was filed. Consequently, he was not a real party in interest and had no standing to prosecute this suit. Rule 17, F.R. Civ. P.; *United States of America* v. *936.71 Acres of Land, et al.*, ____ F.2d ____ (5th Cir. 1969). While plaintiff might contend, under the last sentence of Rule 17(a), F.R.Civ.P., that the suit was filed timely:

> ". . . No action shall be dismissed on the ground that it was not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objections for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." Rule 17(a) F.R.Civ.P.,

still we must note the Advisory Committee notes to Rule 17 state that the above provision "should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made . . ." 28 U.S.C. Rule 17, Cum. P. P. Notes p. 5. We do not find either situation to be present here.

Second, it is settled law that an intervenor takes the case as he finds it, 2 Barron & Holtzoff, *Federal Practice and Procedure* § 593 at 359 (Wright rev. 1961); *General Insurance Co. of America* v. *Hercules Construction Co.*, 385 F.2d 13 (8th Cir. 1967). Since, as noted above, there is no proper suit before this Court, plaintiff Tennant has no suit into which to intervene.

Third, January 9, 1970, defendant filed with this Court the transcript of an interview between a member of the Morehouse Parish Sheriff's Department and would-be intervenor Tennant. That transcript reflects that Tennant never consented to have her name used as intervenor or plaintiff in this case. It also reflects that Tennant owns immovable property in Parish and therefore is not a member of the class on whose behalf this suit was filed.

Consequently, since we do not reach the constitutional question attempted to be presented, this three-judge Court must be and is hereby dissolved. The order granting substitution of Simpson as plaintiff is recalled, as having been issued improvidently, and is rescinded, and the motions to dismiss and for summary judgment are granted.

THUS DONE AND SIGNED, this 23rd day of January, 1970.

(Signed) ROBERT AINSWORTH
Circuit Judge
(Signed) BEN C. DAWKINS, JR.
Chief District Judge
(Signed) R. PUTNAM
District Judge